IN RE DYKE ET AL.

Case No. 4,227.

{9 N. B. R. (1873) 430.}[1]

District Court, E. D. Michigan.

BANKRUPTCY—RENT—LIEN—RECORDING OF LEASE.

A landlord petitioned to have his rent paid in full out of the proceeds of certain property of the bankrupt, on which he claimed a lien by the peculiar terms of his lease. *Held*, that he had no lien because the lease was not recorded as required by the statute of Michigan, and petition must be dismissed, but without costs to either party.

{Cited in McLean v. Klein, Case No. 8,884.}

LONGYEAR, District Judge. The bankrupts were partners in trade, and as such were doing business, at the time of the bankruptcy,

as druggists, at No. 112 Griswold street, Detroit. They were successors to the late firm of Humphrey & Dyke, composed of one W. Humphrey and the said Thomas J. Dyke, formerly doing business at the same place. The said late firm of Humphrey & Dyke held the store and premises where they carried on business, as tenants of the petitioner, by virtue of a lease bearing date December 1st, 1872. The lease was for the term of four years and three months from date, at the yearly rent of six hundred dollars, payable monthly in advance; and it contains a covenant "that all goods, wares and merchandise, household furniture, fixtures, or other property, which are or shall be placed in or on said premises by them, shall be liable, and this lease shall hereby constitute a lien or mortgage on said property, to secure the rent due or to grow due on this lease." And the lessor is authorized in case of default "to enter upon said premises, or take any of said mortgaged property, wherever the same may be found, and sell and dispose of the same in the same manner as in case of chattel mortgage on default thereof, giving six days' notice," etc., and all benefit of exemption laws are waived. Humphrey & Dyke occupied the store under this lease until July 20th, 1873, when Humphrey sold and transferred his interest in the stock, furniture and fixtures, to the bankrupts and retired, the latter agreeing to pay the debts of the former firm. The bankrupts occupied the store and carried on business until their bankruptcy, about September 4th, 1873. The lease was not filed as a chattel mortgage in the office of the city clerk of Detroit until after Humphrey had sold to the bankrupts, but it was so filed on the 1st day of August, 1873. The bankrupts, as a matter of fact, occupied the store under the terms of the lease; but, as filed in the city clerk's office, the lease was not accompanied by any evidence of that fact. No rent had been paid since about the middle of February, 1873, and the amount in arrears at the time of the bankruptcy was three hundred and thirty dollars, which, together with three dollars and thirty-four cents for water rates paid by petitioner, he has proved in this court as a secured debt, and now asks that the same may be paid as such out of the proceeds of the store furniture and fixtures put into the store by Humphrey & Dyke, and transferred to the bankrupts. To this the assignee, on behalf of the creditors of the bankrupts, Dyke & Marr, objects.

In the first place, the covenant in the lease for a lien, etc., is not a mortgage, because it does not purport to change, in any way, the title to the property. It gives no right in the property itself until reduced to possession under the power to take possession and sell; and I think it admits of much doubt whether the mere agreement for a bare lien placed the petitioner upon any better footing than other creditors, before actual possession under the power. Holmes v. Hall, 8 Mich. 66. My opinion is that the assignee having obtained possession, whatever lien petitioner may have had is gone, and cannot be enforced as against the other creditors. In re Joslyn [Case No. 7,550]. But it is not necessary to rest the case upon this point alone. By the statutes of Michigan (2 Comp. Laws 1871, p. 1458,

§ 4706) it is provided as follows: "Every mortgage or conveyance intended to operate as a mortgage, of goods and chattels which shall hereafter be made, which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage, or a true copy thereof shall be filed in the office of the township clerk of the township, or city clerk of the city, or city recorder of cities having no officer known as city clerk, where the mortgagor resides," etc. Therefore, even if considered as a mortgage, or as "intended to operate as a mortgage," the covenant in the lease that it should "constitute a lien or mortgage on said property," was absolutely void as against all the creditors of the original lessees, Humphrey & Dyke, because it was not filed until after that firm had ceased to exist; and it was equally void as against the creditors of Dyke & Marr, the bankrupts, because it was not their covenant, and it was not accompanied by any notice or evidence that they held the property subject thereto. It results that the prayer of the petition must be denied, but without costs to either party as against the other.

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